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ORIGINAL

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NO. 58623-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HUYEN BICH NGUYEN,
AKA GABRIELLE NGUYEN,

Appellant.

OPENING BRIEF

Sheryl Gordon McCloud
1301 Fifth Ave., Suite 3401
Seattle, WA 98101-2605
(206) 224-8777
Attorney for Appellant,
Gabrielle Nguyen

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2. The trial court erred in convicting Ms. Nguyen of physical control of a vehicle while intoxicated, since she was not charged with that crime but with driving while intoxicated.

3. The trial court erred in placing the burden of proving unwitting possession of cocaine on the defendant, rather than placing the burden of proving knowledge on the state.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Defense counsel told the trial court that Ms. Nguyen waived the right to jury trial and filed the signed form, but there was no advice to, or inquiry of, Ms. Nguyen anywhere on the record. The general rule under Brand,[1] Pierce,[2] Downs[3] and Likakur[4] is that

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[1] State v. Brand, 55 Wn. App. 780, 792-93, 780 P.2d 894 (1989), review denied, 114 Wn.2d 1002 (1990), grant of post-conviction relief denied on different grounds (due to procedurally improper collateral attack), 120 Wn.2d 365, 842 P.2d 470 (1992).

[2] State v. Pierce, ___ Wn. App. ___, 142 P.3d 610 (2006).

[3] State v. Downs, 36 Wn. App. 143, 145, 672 P.2d 416 (1983).

[4] State v. Likakur, 26 Wn. App. 297, 300-01, 613 P.2d 156 (1980).

no such inquiry is necessary unless the record shows special circumstances, such as a prior finding of incompetency or mental illness. Given that the record showed both here, does failure to inquire of Ms. Nguyen invalidate the waiver under those cases?

2. The trial court ruled that the evidence was insufficient to prove DUI, and convicted Ms. Nguyen of physical control of a vehicle while intoxicated instead – a conviction which would be permissible only if that were a lesser included offense. But state statutes are silent about whether a lesser included offense must be lesser in elements, or in penalties, also. Given this silence and the interpretive rule of lenity, can physical control be construed as a lesser of DUI when the penalties are now identical?

3. Although state law allows the court to place the burden of proving unwitting possession of cocaine on the defense, do due process clause protections announced in Dotterweich,[5] Staples[6] and Balint[7] prohibit the legislature from making this malum

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[5] United States v. Dotterweich, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943).

[6] Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

[7] United States v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922).

in se drug crime, carrying the stigma and punishments of a felony, a strict liability offense – and is this still an open issue following Cleppe[8] and Bradshaw[9]?

STATEMENT OF THE CASE

When Officer Magallan drove toward I-5 South via the Howell Street on ramp in the early morning hours of February 14, 2003, there was already a car there. Ms. Nguyen sat behind the wheel of a BMW which was still on, with almost all of the car off the road on the "gore point"– the triangle between the on ramp and I-5 itself. She was talking on the cell phone. The officer thought she might be calling for assistance (and indeed she was) so he waited a minute or two until she finished her call, and then asked her to roll down the window. 3/23/06 VRP:27-30 (regarding the stop); 114 (car was on at the time).

He asked if she needed assistance. During the course of their conversation, the officer noticed what he considered the smell of alcohol and some inappropriate mannerisms, so he began to suspect DUI. 3/23/06 VRP:30-35.

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[8] State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981). cert. denied, 456 U.S. 1006 (1982).

[9] State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2003), cert.

Instead of summoning assistance, the officer directed Ms. Nguyen herself to drive the car to a safer place so that he could ask her to perform field sobriety tests. He later testified that he directed her to pull across the on ramp and park on the far right shoulder. 3/23/06 VRP:30-35.

Ms. Nguyen, however, drove forward towards I-5 and then, staying in the entrance/exit lane, drove right off at the next exit. It was the exit at the downtown Convention Center, and she immediately exited the freeway, turned left under the Convention Center, and safely parked her car in the lighted area there that was completely off the road. 3/23/06 VRP:35-43. The officer agreed that this was probably one of the safest places that she could have chosen. 3/23/06 VRP:116.

She then performed field sobriety tests. Given her performance – combined with her inappropriate and speedy mannerisms as well as her suggestive comments to him – the officer believed that she was likely intoxicated. He suspected not just alcohol, but also a stimulant. 3/23/06 VRP:43-65. He then placed her under arrest. 3/23/06 VRP:65-66.

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denied, 544 U.S. 922 (2005).

He searched Ms. Nguyen's car, and found a small baggie of cocaine on the front console between the two seats. 3/23/06 VRP:67.

Officer Magallan had the car impounded and took Ms. Nguyen to the hospital for a blood test. 3/23/06 VRP:75. The parties stipulated that it revealed the presence of both alcohol and a small amount of cocaine in her bloodstream. 3/23/06 VRP:73; 3/27/06 VRP:207 (parties stipulated to blood levels of ethanol .09, cocaine .03, benzoylecgonine .31); Stipulation and Order re Trial Evidence, p. 2, CP:27.

When the case was finally tried, defense counsel waived jury. 3/26/06 VRP:6. The circumstances surrounding this waiver are discussed in more detail in Argument Section I(A). In brief, defense counsel waived jury for Ms. Nguyen and filed a short written waiver form bearing her signature. But she was never asked anything about the waiver in court, and she never said anything about it, either. Id.

The statements that Ms. Nguyen made at the hospital in response to police questioning were suppressed. 3/28/06 VRP:279; CP:169-73 (Findings regarding suppression). Thus, there was no direct evidence about who drove the car to the "gore

point"; the only direct evidence of driving was the fact that she followed the officer's directions when he told her to drive the car to a safer place *after* she was stopped.

The judge – the trier of fact –ruled that this left insufficient evidence of driving, but sufficient evidence that she was intoxicated and in control of a car that was not completely off the roadway. He therefore stated that he would acquit her of the DUI charge (RCW 46.61.502) and convict her of what he called the "lesser included" offense of physical control of a vehicle while intoxicated (RCW 46.61.504), instead. 3/28/06 VRP:280-81 Conclusions of Law V states: "The defendant is guilty of the crime of Physical Control of a Vehicle Under the Influence, the lesser-included crime of Driving While Under the Influence, charged in Count II of the Amended Information." Order on Bench Trial, p. 4; CP:160.

With respect to the cocaine possession charge (RCW 69.50.401), the judge state that he disbelieved the testimony of Ms. Nguyen's Israeli gentleman-friend (who testified by telephone from his home country) when he claimed that the cocaine belonged to him, and that he took it out of his pocket so she would not feel it while they were engaged in a romantic interlude in the car that night. The judge specifically stated that he placed the burden of

proving "unwitting possession" of the cocaine in the car upon the defense, and ruled that the defense had failed to meet that burden. The judge therefore convicted Ms. Nguyen of the cocaine possession charge, also. 3/28/06 VRP:275-77; CP:157-61 (written Findings and Conclusions).

These were the facts presented at trial. But it was almost three years between the February 14, 2003, date of the arrest and the March 23, 2006, date of the trial.

The delay was due largely to Ms. Nguyen's incompetency. The first Order for a competency hearing was signed on July 7, 2004. CP:14-17. She was actually found incompetent by Washington State Hospital, and the parties stipulated that she was still incompetent as late as March 7, 2005. Sub No. 45*; CP__. She was not determined competent to stand trial until July 28, 2005 – two and a half years after the arrest. Sub No. 67*; CP:__ (minute order reflecting parties' stipulation; CP:20-21 (court's order finding defendant had regained competency). A more complete summary

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* Sub Nos. 45 and 67 were not designated. A supplemental designation of clerk's papers will be filed shortly with these documents designated.

of the proceedings regarding Ms. Nguyen's competency appear in Argument Section I(A).

Following trial, Ms. Nguyen found out that defense counsel had previously represented her ex-husband who had been charged with assault for a vicious attack on her. She did not know before that it was the same defense lawyer, and the defense lawyer stated that he did not know that she was the victim. 7/19/06 VRP:1-15. Given Ms. Nguyen's allegations that this amounted to a conflict of interest, defense counsel was permitted to withdraw. New counsel substituted in for the sentencing. 7/27/06 VRP:319. The court denied the motion for new trial based on this perceived conflict, though. 7/27/06 VRP:326. Upon withdrawing, trial counsel expressed his renewed concern that Ms. Nguyen might again have slipped into incompetency. 7/19/06 VRP:15.

The defense Sentencing Memorandum contained extensive briefing on the duration, nature and severity of Ms. Nguyen's mental health problems. CP:77-150 (Sentencing Memorandum, Ex. A – 12/23/03 Western State Hospital Mental Health Evaluation; Ex. B – 3/2/05 Western State Hospital Mental Health Report; Ex. C – 6/17/05 Wise Report; Ex. D – King County Jail Records); CP:151-54 (Supplemental Sentencing Memorandum, Ex. A – 6/2/06

MacClure letter re mental health treatment); CP:174-76 (Second Supplemental Sentencing Memorandum). The state did not disagree that her mental illness, hallucinations, and incompetency were longstanding problems that should be considered by the court. The court tried mightily to fashion a sentence that would take account of these issue, but was constrained by the statutory mandatory minimum (given the prior history). It imposed a sentence including 90 days of work release on the DUI, and 90 days concurrent on the felony possession charge. 7/27/06 VRP:329; CP:183-89, 190-93.[10]

ARGUMENT

I. WHILE A WRITTEN JURY TRIAL WAIVER MIGHT SUFFICE IN THE ORDINARY CASE, MORE IS NECESSARY UNDER PIERCE, BRAND, DOWNS AND LIKAKUR WHERE, AS HERE, THE RECORD CONTAINS A PRIOR FINDING OF BOTH INCOMPETENCY AND MENTAL ILLNESS.

A. The Trial Court Made No Inquiry of Ms. Nguyen at all Before Accepting the Jury Trial Waiver

[10] In defendant's allocution, she told the judge, "I was forced into this bench trial." 7/27/06 VRP:332. She described how this occurred. Id. Based solely on Ms. Nguyen's statements, the judge rejected her claim that the waiver of jury trial was not knowing. Id., VRP:336.

Ms. Nguyen was charged on March 23, 2004. CP:1-6. A long period of incompetency followed. There were orders compelling her to go to mental health treatment, Sub No. 3*, CP:__; orders for competency evaluations, CP:14-17; CP:19; Sub No. 32*, 37*; CP:__, __ (a sample of some of the orders continuing hearings so that Western State would have additional time to finish competency evaluation); a period of observation at Western State; stipulations that defendant was not competent, Sub No. 45*; CP:__ (minutes, showing stipulation to this effect); and evaluations of her mental state.

The Washington State Hospital Evaluation found her to be mentally ill, psychotic and incompetent to stand trial; it also documented her psychiatric history, two prior instances of involuntary commitment, auditory and visual hallucinations, family history of psychotic disorders, and claimed conversations with God. Sub No. 93*; CP:__. That report also opined that due to mental

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* Sub Nos. 3, 32 and 37 were not designated. A supplemental designation of clerk's papers will be filed shortly with these documents designated.

* Sub Nos. 45, 67 and 93 were not designated. A supplemental designation of clerk's papers will be filed shortly with these documents designated.

illness, she was not competent to stand trial.[11] She was not deemed competent again until July 28, 2005. Sub Nos. 67*; CP:__; 20-21 (minutes and Findings).

So the trial court file alone reveals that a year and a half elapsed between the February 14, 2003, date of the crime and the July 28, 2005, date on which Ms. Nguyen was again deemed competent to stand trial.

If the record did not make this clear to the court before the start of trial, defense counsel certainly did. On March 23, 2006, just before trial began, defense counsel explained to the court that the charge was so old because there had been a long period during which defendant was incompetent. He went on to say that he believed that Ms. Nguyen had regained competency to stand trial. 3/23/06 VRP:6.

After telling the court about this period of incompetency, defense counsel continued that he would waive trial by jury on behalf of his client. 3/23/06 VRP:6. Ms. Nguyen said nothing, and the trial court asked her nothing. Defense counsel filed a document

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[11] The Defendant's Sentencing Memorandum, filed at the conclusion of the case, contains as attachments four separate evaluations of Ms. Nguyen's mental health and periods of incompetency over the ten years preceding trial. CP:77-150.

with her signature on it, which purported to waive her jury trial right. CP:39. Defense counsel concluded:

> I think, your Honor, and for the record, I should indicate that I went over that with my client in detail, and I told her she had an absolute right, a constitutional right, to a jury trial. And she is voluntarily giving that up. And I think the reasons make sense.

3/23/06 VRP:6. No one asked for Ms. Nguyen's opinion.

B. The Defendant's Intent to Waive Jury Must Be Established on the Record, in Open Court, Under *Stegall, Acrey,* and *Wicke.* The Written Waiver Without Inquiry in Court is Sufficient in Some Cases, But Not All.

A defendant cannot validly waive a jury trial by silence or inaction. The state Supreme Court has explicitly held in numerous cases: "we have refused to infer a waiver when the record shows less than an affirmative, unequivocal waiver by defendant." State v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (relying upon State v. Wicke, 91 Wn.2d 638, 591 P.2d 452 (1979) (no effective waiver of jury trial where no written waiver and attorney orally waives jury trial right in open court; court holds waiver must be expressly made, by defendant, on the record)); Seattle v. Crumrine, 98 Wn.2d 62, 653 P.2d 605 (1982) (no written or oral waiver by defendant on the record, conviction reversed); and Seattle v.

Williams, 101 Wn.2d 445, 680 P.2d 1051 (1984) (conditional jury trial waiver at arraignment must be done by defendant in writing)). Accord State v. Stegall, 124 Wn.2d 719, 881 P.2d 979 (1994) (waiver of right to 12-person jury valid only if record shows "(1) a personal statement from the defendant expressly agreeing to the waiver, or (2) an indication that the trial judge or defense counsel has discussed the issue with the defendant prior to the attorney's own waiver").

A written waiver may be effective to make this showing in some cases. But that is only when the defendant is "demonstrably aware" of the right to jury trial, and the writing effectively shows a knowing waiver of that right. State v. Acrey, 103 Wn.2d 203, 208 ("Where a defendant is demonstrably aware of the constitutional right to a jury and has expressly waived that right in writing, the waiver will be effective.").

Similarly, a statement on the record by defense counsel may suffice in some cases. But that is only when the record, fairly read, indicates that the defendant knew, heard, and understood what the lawyer was saying – otherwise, the lawyer's statements alone without the defendant's on-the-record assent are insufficient. State v. Stegall, 124 Wn.2d 719, 730-31 (no valid waiver where attorney

waives right to 12 person jury on the record in open court where the record "arose suddenly," there was no indication that counsel and client conferred on the point, but there was indication that counsel waived a full jury "to avoid the embarrassment of proceeding with jury selection with a broken zipper on his fly").

C. Where, as Here, the Record Shows That Defendant Was Previously Deemed Incompetent and Diagnosed With Mental Illnes, Inquiry Into the Voluntariness of Defendant's Intent to Waive Jury Must be Especially Searching Under *Pierce*, *Brand*, *Downs* and *Likakur*.

As the state Supreme Court decisions summarized above show, in general, if the defendant executes a written waiver of the right to jury trial, there is usually no further inquiry of the defendant that is required. State v. Downs, 36 Wn. App. 143, 145; State v. Likakur, 26 Wn. App. 297, 300-01.

But there is a critical exception: "*absent circumstances that initially raise a question regarding the defendant's capacity to waive a jury trial*, the trial court need not conduct an independent inquiry on that issue prior to accepting the waiver." State v. Downs, 36 Wn. App. 143, 145 (emphasis added) (quoting Likakur, 26 Wn. App. 297, 300-01). The corollary, of course, is that where there are special circumstances regarding capacity or competency, more

than a written waiver combined with defendant's silence in the courtroom is needed.

Applying these general rules, the appellate courts are unanimous in holding that where (as here) the defendant has been found to be incompetent, or to be mentally ill, at least once during the course of the proceedings, the written waiver alone with no further inquiry or assent on the record is insufficient – a fuller inquiry into voluntariness is required.

The court applied this rule in Downs, 36 Wn. App. 143. It recited the general rule that there is no need for a full inquiry prior to a jury trial waiver, and it recited the exception for special circumstances. Downs, 36 Wn. App. at 145. It concluded that the exception was inapplicable because there was no question of incompetency to waive and, on the contrary, the record showed a high degree of understanding: "Nothing in the record suggests that Downs' signature on the waiver form was not obtained voluntarily, knowingly, or intelligently. Downs was a college graduate and a corporate vice-president. Moreover, Downs signed forms waiving his right to an omnibus hearing and his right to trial within 90 days. Although Downs admitted his sexual attraction to children, he in no

way contends that this aberration affected his capacity to waive a jury trial." State v. Downs, 36 Wn. App. 143, 146.

In Ms. Nguyen's case, in contrast, her prior incompetency and current mental illness was clearly established by the record. Thus, under Downs, further inquiry, in court, concerning the voluntariness and competency of her waiver, were required.

The decision in Likakur, 26 Wn. App. 297, is similar. The appellate court in that case reiterated the rule that where there is a reason to suspect that the defendant does not have the capacity or ability to knowingly and voluntarily waive the jury trial right, a more searching inquiry is required prior to a jury trial waiver. Id., 26 Wn. App. at. 300. But the court continued that no such circumstances appeared there: "In the instant case there is no history of psychiatric disorders or unusual behavior. There is no conflict of 'experts' as to his sanity. The only expert opinion before the court was that defendant was competent." Id., 26 Wn. App. at. 301.

Interestingly, the Likakur court also distinguished other cases in which incompetency to waive jury trial was apparent from the record and, hence, in which silent waivers of jury trial were insufficient; on this point, it explained in part:

> The record fails to disclose any facts or circumstances which initially raise the issue of defendant's capacity to waive his right to a jury trial. ... [In contrast,] [i]n United States v. David, supra, the court reversed a conviction and remanded for a new trial, where the trial court neglected to make a determination after appropriate inquiry that a waiver of a jury trial was intelligently and voluntarily made. In that case there was initially a difference of opinion between the doctors as to defendant's competency to stand trial, which was later resolved. *Nevertheless, the court held that evidence of prior psychosis and hospitalization for such condition; the original disagreement among the doctors; and defense counsel's persistently expressed concerns of defendant's capacity to be tried and to waive a jury, clearly put in issue defendant's capacity to waive a jury trial. ....*

Likakur, 26 Wn. App. at 300-01 (emphasis added). As this quote shows, the Likakur court holds that not just an actual finding of incompetency, but even a history of disagreement among doctors over competency, should trigger the need for extended inquiry. The Likakur court simply declined to apply the exception mandating extended inquiry to Mr. Likakur, because the record revealed neither incompetency nor a valid concern about it.

Still, the Likakur trial court did much more to ensure that that defendant understood, and knowingly waived, his jury trial right, than the trial court did in Ms. Nguyen's case. The defendant in that case had been referred for a competency finding, and was found

competent: "The report concluded with the opinion that defendant knew what he was charged with; knew the consequences of a conviction; was able to assist his attorney; and was competent to stand trial." Likakur, 26 Wn. App. 297, 299. The trial court thereafter conducted a hearing on the issue of not just competency to stand trial, but also competency to waive jury. It considered the psychological evaluation determining the defendant to be competent; it made inquiry of the defendant; and that trial court, like the mental health professionals, concluded that the defendant was competent to stand trial and also competent to waive jury. *In fact, the trial court even had the defendant reaffirm, in open court, his desire to waive jury expressed on the written form.*[12] Thus, even though the Likakur appellate court ruled that there was no reason to apply the most searching inquiry standard given the finding of

[12] Likakur, 26 Wn. App. 297, 299 ("[Defense counsel] stated that he had no trouble working with defendant on the case. The court conducted a brief hearing during which the psychiatrist's report was admitted in evidence followed by a short colloquy with defendant. The defendant reaffirmed his written waiver of a jury trial. Also discussed, were the defendant's recent travels, his work, his acknowledgment that he was aware of the nature of the charges, and that he was well enough to proceed with the trial. The court concluded that defendant was competent to stand trial and thereafter accepted and approved the written waiver of the jury trial.").

competency, it pointed out that the trial court had engaged in a somewhat searching inquiry of the voluntariness of the defendant's jury trial waiver right on the record, nonetheless.

Ms. Nguyen, in contrast, had been evaluated and determined to be *in*competent at an earlier point in the proceedings. The Superior Court did not find that she had regained competence until a year and a half after the incident. She was even diagnosed with severe mental illness. A period of treatment followed.

Her case, therefore, has all the earmarks of a case in which the most searching inquiry about the validity of a jury trial waiver is required. Yet she did not even get the minimal on-the-record inquiry about the voluntariness of her jury trial waiver that the much more clearly competent defendant in Likakur got. Under Likakur, further inquiry was required.

The same is result is compelled by State v. Brand, 55 Wn. App. 780, 792-93, a case that is very similar to Likakur. The defendant in that case argued on appeal that his waiver of the right to a jury trial was not knowing, intelligent and voluntary, and he emphasized the question that had arisen about his competency to stand trial. But he, like Likakur (and unlike Nguyen), had actually been found competent to stand trial, not incompetent. *And he, like*

Likakur (and unlike Nguyen) had actually been questioned about the waiver of his jury trial right in open court: "In this case, not only was a written waiver filed, but (1) Brand's counsel stated in court that Brand was waiving a jury trial, (2) Brand orally waived a jury trial, and significantly (3) Brand stated that he had discussed the matter 'to his satisfaction' with his attorney." Brand, 55 Wn. App. at 785. The Brand court affirmed, and found the jury trial waiver to be sufficient, given the in-court inquiry, limited as it was. Id., 55 Wn. App. at 785-89.

Ms. Nguyen did not get these critical protections, even though she had been found incompetent, rather than competent. She did not "orally waive[] a jury trial" and she did not "state[] that [s]he had discussed the matter 'to [her] satisfaction with [her] attorney." Under Brand, the inquiry of Nguyen was insufficient.

The same result is required even under the most recent authority we have found on this subject, State v. Pierce, 142 P.3d 610. In Pierce, the defendant was convicted of a variety of drug and weapons charges. On appeal he asserted that his waiver of the right to a jury trial was unconstitutional. The Pierce court recited the general rules regarding such a waiver. Pierce, 142 P.3d at 613-14. It made no reference to any special circumstance, like

incompetency or mental illness, which might have affected the in-court inquiry that was necessary. Instead, it held that the court's minimal inquiry was sufficient.

But that minimal inquiry was far more than Ms. Nguyen received. In Pierce, the trial court received the written waiver, *but also inquired of the defendant, in open court, whether that was what he himself wanted.* It was because the defendant answered yes to that question, in the solemnity and openness of court and on the record, that the court rejected the defendant's effort to require a more searching inquiry under the state constitution:

> We hold that Pierce validly waived his jury trial right. He received the advice of counsel and submitted his waiver in writing. The court informed Pierce that he had the right to a unanimous verdict by 12 people. Pierce knew that by waiving this right, only the judge would decide his case. *He told the court that he understood his jury trial right and was waiving it freely and voluntarily.*

Pierce, 142 P.3d at 614 (emphasis added).

Thus, there are three critical distinctions between the Pierce case and Ms. Nguyen's case. First, there were no special circumstances suggesting the need for heightened inquiry in that case, while there were in Ms. Nguyen's case. Second, the trial court gave the defendant affirmative advice about the

consequences of the waiver, including the loss of the right to a unanimous verdict by a full jury. And third, even without a full, heightened, inquiry, the trial court conducted enough of an inquiry on the record in open court to determine that the defendant agreed with the lawyer's assertion that his jury trial right should be waived.

In Ms. Nguyen's case, in contrast, there *were* circumstances indicating the need for heightened inquiry – but not even the limited inquiry approved in Pierce occurred.

Under all these cases, the record in Ms. Nguyen's case showed special circumstances. Those special circumstances make the general rule that a written waiver is sufficient, inapplicable. They trigger application of the rule that at least some on-the-record inquiry of defendant's assent to the waiver is necessary. That inquiry need not be especially searching or detailed. It need not even be as much as the defendants in cases like Pierce, Likakur, and Brand actually got, despite a record showing their undisputed prior competency rather than their undisputed prior incompetency (as in Ms. Nguyen's case). Ms. Nguyen, however, did not even receive that much. Her jury trial waiver was therefore invalid.

II. PHYSICAL CONTROL IS NOT A LESSER INCLUDED OFFENSE OF DUI BECAUSE THE PENALTIES ARE IDENTICAL. THE INSUFFICIENCY OF THE EVIDENCE OF DUI SHOULD THEREFORE HAVE RESULTED IN ACQUITTAL RATHER THAN CONVICTION OF AN UNCHARGED CRIME.

A. The State Charged Ms. Nguyen with DUI; The Trial Court Ruled That There Was Insufficient Evidence of DUI; It Then Convicted Her of the Uncharged Crime of Physical Control, Instead.

The state charged Ms. Nguyen with driving while intoxicated (and cocaine possession). With respect to the DUI count, it read in full:

> That the defendant HUNEN BICH NGUYEN AKA GABRIELLE NGUYEN in King County, Washington on or about February 15, 2003, *drove a vehicle within this state: (a) and while driving had an amount of alcohol in her body sufficient to cause a measurement of her blood to register 0.08 percent or more by weight of alcohol within two hours after driving, as shown by analysis of the person's blood; and (b) while under the influence of or affected by intoxicating liquor or any drug; and (c) while under the combined influence of or affected by intoxicating liquor and any drug*;
>
> Contrary to RCW 46.61.502 and 46.61.506, and against the peace and dignity of the State of Washington.

CP: 25, Count II (emphasis added). As the italics show, this charges DUI – not physical control of a vehicle while under the influence.

After hearing all the evidence, the court ruled that there was insufficient proof of driving to convict Ms. Nguyen of DUI. It did find evidence that she was behind the wheel of a car that was partially on the roadway, with the motor running, while intoxicated. It therefore stated that it would convict her of the lesser included offense of physical control of a vehicle while intoxicated, instead. 3/28/06 VRP:279-81.

B. A Defendant Can be Convicted of Only the Charged Crime, or a Lesser Degree or Lesser Included Offense

When a person is charged with one crime, he or she can be convicted of either that crime, or of a lesser degree crime or a lesser included crime. RCW 10.61.003 ("Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense"); RCW 10.61.010 ("Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the

same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime"); RCW 10.61.006 ("In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.").

But he or she cannot be convicted of any other crime. State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997) (defendant can generally be convicted only of crime charged); State v. Irizarry, 111 Wn.2d 591, 763 P.2d 432 (1988); State v. DeRosia, 124 Wn. App. 138, 150, 100 P.3d 331 (2004) (same).

C. Physical Control is Not a Lesser Degree of DUI

Driving while intoxicated is a gross misdemeanor, located at RCW 46.61.502.

Physical control of a vehicle while intoxicated is a gross misdemeanor, located at RCW 46.61.504.

The have exactly the same penalties. RCW 46.61.502(5) (DUI is gross misdemeanor); RCW 46.61.504(5) (physical control is gross misdemeanor); RCW 46.61.505(5) (penalties for both crimes).

Since they are in different statutes and are both gross

misdemeanors, they are crimes of the exact same degree. Thus, one cannot be convicted of physical control as a lesser-degree offense of DUI.

D. Physical Control is Not a Lesser Included Offense of DUI, Because They Have the Exact Same Penalties

The only real question is whether physical control is a lesser included offense of DUI.

It is true that all the elements of physical control fall within the elements of DUI and, hence, that physical control meets the "legal test" for being a lesser included offense of DUI. State v. Speece, 115 Wn.2d 360, 362, 798 P.2d 294 (1990) (explaining legal and factual tests for lesser included offenses).[13] It is also true that the evidence in this case lacked proof of Ms. Nguyen's driving, so the "factual test" for a lesser included offense was also satisfied. Id.

But the two crimes have exactly the same penalties.

Can one crime be a lesser offense of another if its penalties are identical, rather than lesser?

We find no Washington cases on this precise issue (except

[13] Accord State v. Harris, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993).

McGuire v. City of Seattle, 31 Wn. App. 438, 642 765, review denied, 98 Wn.2d 1017 (1983), discussed below, which has been overruled in part[14] and which never even addressed the fact that the two crimes have identical penalties).

A review of the case law of other jurisdictions reveals that other jurisdictions have come to at least three different answers to this question.

We have found two states, Ohio and California, holding that one offense is not a true lesser of another unless the second offense has lesser penalties. State v. Deem, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988) (Ohio Supreme Court sets for three part test to determine when an offense may be a lesser included of another offense: "[a]n offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense, cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense."); People v. Rush, 16 Cal.App.4th 20, 20 Cal. Rptr. 15 (Cal. App. 2 Dist. 1993) ("Ordinarily, when all of

[14] State v. Votava, 149 Wn.2d 178, 66 P.3d 1050 (2003).

the elements of one offense carrying lesser penalties are expressly contained within the elements of another offense carrying greater penalties, the former is a lesser included offense of the latter."), disapproved on other grounds, People v. Montoya, 33 Cal.4th 1031, 94 P.3d 1098, 16 Cal.Rptr. 3d 902 (2004).

Two other states, Arizona and North Carolina, have held that one offense is not a true lesser of another unless the second offense has the same or lesser penalties. State v. Chabolla-Hinojosa, 192 Ariz. 360, 965 P.2d 94 (1998) ("A lesser-included offense can have the same or lesser penalty as the greater offense."); State v. Young, 305 N.C. 391, 289 S.E.2d 374 (1982).

And two other states – Florida and Alaska – seem to hold that the second crime need not have lesser penalties, and might even have greater penalties. Sanders v. State, __ So.2d __, 2006 WL 3025777 (Fla. 2006) (lesser need not have lesser penalties); Nicholson v. State, 656 P.2d 1209, 1212 (Alaska 1982) (adjective "lesser" in applicable Criminal Rule refers to relations between elements of crimes, not relation between their penalties). Cf. State v. Jenkins, 198 Conn. 671, 504 A.2d 1053 (1986) (legislative scheme that provided for a greater penalty for kidnapping than for kidnapping with a firearm was unconstitutional).

Thus, there is no great weight of authority pulling in one direction or the other.

RCW 10.61.006 is completely silent about the meaning of lesser-included offenses or, in the words of that statute, "necessarily included" ones.

Thus, the statutory language provides no definitive answer to this question.

McGuire v. City of Seattle, 31 Wn. App. 438, did address this issue, and did state, as a holding, that the physical control ordinance at issue in that case was a lesser included offense of the DUI ordinance in that case. But it was construing SMC 11.56.020, a single municipal statute which criminalized both DUI and physical control. It ruled that each element of physical control was included within the elements of DUI listed in that single statute, and hence the City could amend its DUI charge to a physical control charge mid-trial. It never even discussed whether the penalties for those two crimes in the Seattle Municipal Code were the same or different, or whether that mattered.

Further, McGuire's holding on this point depended on the additional conclusion that the "safely off the roadway" defense was only available when the defendant had moved the vehicle off the

roadway. This aspect of McGuire was overruled in State v. Votava, 149 Wn.2d 178, 66 P.3d 1050 (2003), which held that a defendant is entitled to a jury instruction on the safely-off-the-roadway defense, even if it is not the defendant who moved the vehicle off the road.

Despite the limited nature of its discussion of the lesser included offense issue, the fact that it recited only the "legal test" and never considered the impact of the similarity of the penalties, and the fact that it was construing a City law that placed both crimes in a single ordinance rather than separating them out as separate crimes with identical penalties, McGuire became the single most-cited case for the overarching general principle that physical control is always a lesser included offense of DUI, no matter what statutes describe those crimes. While McGuire is often cited, its failure to deal with the equivalence of penalties issue or the difference between the state and City statutes describing these crimes makes its continuing validity suspect.

We are therefore left with a dearth of interpretive assistance, from the Washington courts or the sister jurisdictions.

In this situation, we suggest that there is a statutory question – concerning the interpretation of RCW 10.61.006 – and a

constitutional question – concerning the notice required before a person can be convicted of an uncharged crime. The only clearly applicable interpretive rule upon which this Court can rely to answer the statutory question is the rule of lenity.[15] The only clearly available interpretive rule upon which this Court can rely to answer the constitutional question is the rule of constitutional avoidance.[16]

Both compel this Court to err on the side of interpreting the statute regarding availability of lesser included offenses to be limited to those with not just less elements but also less punishment. The rule of lenity does so, because the statute and court rule are at best ambiguous about the definition of a lesser included offense, and so the most lenient interpretation must be chosen. The rule of constitutional avoidance does so, because any

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[15] Ratzlaf v. United States, 510 U.S. 135, 148, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); United States v. Figueroa, 165 F.3d 111, 119 (2d Cir. 1998); State v. Lively, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996); Matter of Sietz, 124 Wn.2d 645, 652, 880 P.2d 34 (1994); State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998) ("If there is no contrary legislative intent, we apply the rule of lenity, which resolves statutory ambiguities in favor of the criminal defendant.").

[16] See State v. Hall, 95 Wn.2d 536, 539, 627 P.2d 101 (1981) ("A court should avoid reaching constitutional issues if the issue can be resolved in some other way.").

other conclusion risks convicting defendants of crimes with which they were not charged and of which they had no notice.

Indeed, Washington would be in good company to apply these principles and conclude that DUI and physical control are different, or alternative, crimes. Several other jurisdictions characterize their DUI and physical control statutes as alternative crimes. State v. Stevens, 138 P.3d 1262 (Kan. 2006); State v. Bryan, 2004 WL 1533828 (Tenn. Crim. App. 2004), *3; State v. Preston, 1997 WL 36805 (Tenn. Crim. App. 1997), *2; Hogan v. State, 178 Ga. App. 534, 535-36, 343 S.E.2d 770 (1986).

III. THE STATE SUPREME COURT'S DECISION THAT FELONY COCAINE POSSESSION IS A STRICT LIABILITY CRIME VIOLATES DUE PROCESS PROTECTIONS AND CONFLICTS WITH BALINT, DOTTERWEICH, AND STAPLES

A. The Trial Court Placed the Burden of Proving Unwitting Possession on Defendant

Ms. Nguyen was charged with felony possession of cocaine in violation of RCW 69.50.401(d). CP:24.

The parties agreed (3/23/06 VRP:10) and the trial court ruled that the state need not prove that Ms. Nguyen *knew* that there was cocaine in the car in order to be convicted of the charged crime of cocaine possession. Instead, it treated unwitting possession as an

affirmative defense for the defendant to prove by a preponderance of the evidence. It then concluded that despite the testimony that a man with whom she was having a romantic liaison brought his own cocaine into the car for his own use and without her knowledge, Ms. Nguyen had failed to prove unwitting possession by a preponderance of the evidence. 3/28/06 VRP:276 (court rules that Ms. Nguyen did have dominion and control over the cocaine; court "cannot be convinced by a preponderance of the evidence that it was unwitting possession.").

B. This Interpretation of the Felony Possession of Cocaine Statute Was Upheld in *Bradshaw* On Statutory Interpretation Grounds – But That Decision Did Not Consider the Constitutionality of that Interpretation Because it Was Inadequately Briefed

In State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190, the state Supreme Court ruled that the drug possession statute has no knowledge element or other mens rea requirement, and that the burden of proving the defense of unwitting possession could be placed on the defense.[17] It relied primarily on the legislative history

[17] In a prosecution for unlawful possession, the State must establish the nature of the substance and the fact of possession by the defendant. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Under state law, it does not bear the burden of proving

and plain language of the statute. It cited federal cases, but construed them as focusing on the issue of statutory interpretation. It made the general overall observation that "the legislature may create strict liability crimes," id. 152 Wn.2d at 536, and characterized its task as trying to figure out whether the legislature did so in the case of the drug possession statute.

Thus, Bradshaw made clear that under RCW 69.50.401, possession of cocaine is a strict liability statute.

We raise a different issue here – whether such a strict liability felony statute punishing such a malum in se crime is constitutional. This issue was left open by the state Supreme Court in Bradshaw. Bradshaw, 152 Wn.2d at 539 ("Bradshaw and Latovlovici also assert that without a scienter element, RCW 69.50.401 is unconstitutionally vague and violative of substantive due process principles. But they have not adequately briefed these arguments."). It was also left open in State v. Cleppe, 96 Wn.2d

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either knowledge or intent to possess, or knowledge of the nature of the substance possessed. State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (neither guilty knowledge not intent is element of possession of controlled substance); Staley, 123 Wn.2d at 799. Once the State establishes prima facie evidence of possession, the defendant may affirmatively assert the defense that possession was unwitting. Id., at 799; State v. Pierce, 142 P.3d 610, 615 (2006).

373, 635 P.2d 435 (1981), which came to the same conclusion over 20 years earlier. The Cleppe Court, like the Bradshaw Court, acknowledged the debate over whether felony drug possession is a public welfare offense for which scienter can be omitted, or a regular crime for which scienter must be implied; it then decided not to resolve that debate –it held that the legislature decided to delete any intent element, and that was the end of the inquiry.[18]

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[18] The Cleppe court stated in full on this point, after discussing the debate among the state appellate courts over whether this was a public welfare offense:

> We need not discuss further mala in se and mala prohibita. Suffice to say that the legislature in responding to the problem of drug abuse, one of the major social evils of our time, adopted the Uniform Controlled Substances Act. The act, as introduced in the Senate, made "knowingly" and "intentionally" elements of the misdemeanor of simple possession of a controlled substance. As the legislature worked its will on the bill, the words "knowingly or intentionally" were deleted from subsection 401(c) and the crime was upgraded from a misdemeanor to a felony. No change was made in subsection 401(a), as introduced.
>
> This conflict, if such it be, must be corrected by the legislature, not the court. The legislature has met twice since our decision in Boyer that guilty knowledge is an implicit element of the subsection 401(a) crime of delivery, and it has not revised subsection 401(a). As to subsection 401(c), the legislative intent is clear.

C. The Starting Point for Analysis is the Rule that Crimes Lacking Scienter are Disfavored

Thus, the constitutional question is still an open question. The starting point for analysis is the rule that crimes lacking scienter requirements are disfavored. "In our jurisprudence guilt is personal." Scales v. United States, 367 U.S. 203, 224-25, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961). "The existence of a mens rea is the rule of, rather than the exception to, principles of Anglo-American jurisprudence." United States v. United States Gypsum Co., 438 U.S. 422, 436, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978) (citation omitted). As explained in Morissette v. United States, 342 U.S. 246, 250-01, 72 S.Ct. 240, 96 L.Ed.2d 288 (1952), "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

D. The Only Exception is for Public Welfare Offenses, That is, Crimes With a Regulatory Purpose And Limited Penalties, Applying to Acts that are *Malum Prohibitum*

Cleppe, 96 Wn.2d 373, 380.

The only exception to the rule requiring scienter is for "public welfare offenses." Morissette v. United States, 342 U.S. 246, 254. "Public welfare offenses" are regulatory crimes. Their purpose is to regulate "industries, trades, properties or activities that affect public health, safety, or welfare." Id.; United States v. Launder, 743 F.2d 686, 689 (9th Cir. 1984). They are not the traditional, malum in se, crimes; "These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals." Morissette, 342 U.S. at 255.

In fact, public welfare offenses "are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty." Morissette, 342 U.S. at 255.

But drug possession has clearly been classified as a malum in se crime against society and against morals. State v. Hennings, 3 Wn. App. 483, 475 P.2d 926 (1970). In fact, it was for that reason that this Court implied the element of intent into controlled substances offenses in State v. Smith, 17 Wn. App. 231, 562 P.2d 659 (1977), review denied, 89 Wn.2d 1022 (1978). (Although Bradshaw and

Cleppe held to the contrary, as we discussed above, they leave open this issue that was the subject of Smith.) Under Morissette, this should place it outside the category of public welfare offenses for which scienter can be deleted (or presumed).

Further, the Washington Supreme Court has ruled that drug possession does have a victim – the public at large. State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000); State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998) (same); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (same); State v. Garza-Villarreal, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). This also places cocaine possession outside the category of public welfare crimes described by Morissette, as having no real victim. Morissette, 342 U.S. at 255 ("These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals.")

In addition, public welfare crimes are generally limited to those with relatively small penalties. United States v. Dotterweich, 320 U.S. 277, 280-81 (1943) (upholding strict criminal liability under Food and Drug Act regulations designed "to keep impure and adulterated food and drugs out of the channels of commerce," in part because crime was just a misdemeanor). But Ms. Nguyen's cocaine possession is a

felony, and the stigma and penalties associated with that categorization are not a trivial matter. "[P]ublic welfare offenses generally are ones where the penalty is relatively small, [and] where conviction does not gravely besmirch." United States v. Nguyen, 73 F.3d 887, 891 n.1 (9th Cir. 1995) (quotations omitted). The maximum penalty in Ms. Nguyen's case, in contrast, was 5 years. RCW 69.50.4013(2) (newly reorganized simple possession statute; possession is Class C felony). Cocaine possession does not fit into the public welfare offense exception for this reason, either.

In fact, the drug crimes that the Supreme Court has placed into the "public welfare" category have been truly regulatory. United States v. Balint, 258 U.S. 250, 252 (upholding felony conviction for tax crime involving sale of opium derivative without required paperwork, with no mens rea). The cocaine possession crime at issue here is not a tax collection device or other means of regulation. It is a crime to punish possessors, pure and simple.

E. This Court Must Construe RCW 69.50.401 As Having a *Mens Rea* Requirement to Save it From Unconstitutionality

Since this is not a public welfare statute, the question is whether scienter should be implied. Bradshaw (like Cleppe before it)

said that the answer is no based on legislative intent, not federal constitutional analysis.

But recent Supreme Court decisions have applied a "knowledge" requirement to criminal statutes, *even where the statute's language and history did not require it*, when the crime could not be characterized as a public welfare offense. In Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.28 608 (1994), for example, the Court construed 18 U.S.C. § 5861(a)(6), prohibiting possession of an unregistered firearm but containing no mens rea. The Court reversed the conviction because the government had not been required to prove the defendant had "knowledge" that the item he possessed fit the statutory definition of "machinegun."

The Court in Staples first rejected the argument that the statute described a public welfare offense, traditionally excepted from the background principle favoring scienter. Staples, 511 U.S. 600, 610; United States v. X-Citement Video, 513 U.S. 64, 70, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) (describing Staples). "The [Staples] Court also emphasized the harsh penalties attaching to violations of the statute as a 'significant consideration in determining whether the statute should be construed as dispensing with mens rea.'" Id. (quoting Staples).

Given the rule that statutes are interpreted to avoid constitutional questions (Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 130 L.Ed.2d 372 (1991)), the same result should apply here.

F. The Error is Not Harmless, Because Intent Was the Key Disputed Element at Trial

The state must prove each element of the crime beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684, 685, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The trial court explicitly ruled that the defense bore the burden of proving unwitting possession, and that the defense failed to prove this.

Even if the error is reviewed for harmlessness, Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), it was certainly harmful here. There was no dispute about the fact that the cocaine was in Ms. Nguyen's car. The only disputed issue was who knew it was there.

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IV. CONCLUSION

For all of the foregoing reasons, the convictions should be reversed.

DATED this 13th day of November, 2006.

Respectfully submitted,

Sheryl Gordon McCloud, WSBA No. 16709
Attorney for Appellant, Gabrielle Nguyen

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of November, 2006, a copy of the APPELLANT'S OPENING BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

King County Prosecuting Attorney
Appellate Division
W554 King County Courthouse
516 Third Ave.
Seattle, WA 98104

Gabrielle Nguyen
1121 N. Vassault
Tacoma, WA 98406

Sheryl Gordon McCloud